

DISTRICT COURT OF GUAM  
TERRITORY OF GUAM

JULIE BABAUTA SANTOS, *et al.*,

Petitioners,

v.

FELIX P. CAMACHO, *et al.*,

Respondents.

Civil Case No. 04-00006

**FILED**  
DISTRICT COURT OF GUAM

OCT 17 2007 *WJ*

**JEANNE G. QUINATA**  
Clerk of Court

CHARMAINE R. TORRES, *et al.*,

Plaintiffs,

v.

GOVERNMENT OF GUAM, *et al.*,

Defendants.

Civil Case No. 04-00038

MARY GRACE SIMPAO, *et al.*,

Plaintiffs,

v.

GOVERNMENT OF GUAM,

Defendant,

v.

FELIX P. CAMACHO, Governor of  
Guam

Intervenor-Defendant.

Civil Case No. 04-00049

**PLAINTIFFS SIMPAO AND  
CRUZ' BRIEF IN RESPONSE TO  
COURT'S OCTOBER 15<sup>TH</sup>  
ORDER IN RE DETAILED  
BILLING RECORDS**

1 COME NOW Plaintiffs Mary Grace Simpao and Janice Cruz in response to this Court's  
2 order of October 15<sup>th</sup>, 2007.

3 I. In Camera Review, or Sealing, of Detailed Billing Records is Appropriate Under the  
4 Circumstances of this Case

5 This Court may order *in camera* review of attorney billing statements. Because  
6 the Court exercises care over the common fund in its capacity as a fiduciary, *in camera*  
7 review is warranted. In *Federal Sav. and Loan Ins. Corp. v. Ferm*, Judge Shroeder said  
8 "Appellants next contend that the district court's order requiring the submission of  
9 invoices for legal services provided to Ferm violates both the attorney-client and the  
10 attorney work product privileges. Fee information is generally not privileged. The  
11 payment of fees is incidental to the attorney-client relationship, and does not usually  
12 involve disclosure of confidential communications arising from the professional  
13 relationship. Here, the district court's order amply protects both the confidentiality of  
14 Ferm's communications with her counsel and her counsel's mental impressions  
15 concerning litigation strategy. The order provides for *in camera* review of the invoices  
16 and leaves the submission of supporting documentation up to the discretion of the  
17 attorneys." *Id*, 909 F.2d 372, 374 (9<sup>th</sup> Cir. 1990)(*internal citations and quotations*  
18 *omitted*).

19 Accordingly, counsel for Plaintiffs Simpao and Cruz believe *in camera* review is  
20 appropriate and, in order to preserve confidentiality and the confidentiality of counsels'  
21 mental impressions, will not object to the release of the records to other Plaintiffs'  
22 counsel under a protective order. Release to Defendant however is inappropriate since  
23 the litigation is ongoing.

1 II. Review of Detailed Billing Records, and Comment Upon by Defendant is  
2 Inappropriate as They Have No Standing in the Matter.

3 The Defendant Government wrongly asserts it has “a right to review and  
4 challenge the specific billings being submitted . . . by plaintiffs’ counsel . . . to ensure  
5 that all such billings are reasonable and otherwise in compliance with the governing  
6 statutory requirements.” Government’s Brief Regarding the Applicability of 26 U.S.C.  
7 §7430 (hereinafter “Gov’s Bf.”) at n.1. But the Federal Rules applicable to Class Actions  
8 and well settled Ninth Circuit law hold otherwise. Those authorities also make it clear  
9 that if the Government wanted to prescribe counsel’s fee award it should have negotiated  
10 to pay a specific amount in attorneys’ fees separate and apart from the common  
11 settlement fund. Having failed to do so, the Government has no role to play in the  
12 Court’s evaluation of requests for common fund fee awards

13 The federal rule applicable to class actions limits the universe of those who can  
14 object to an attorney fee motion to persons, unlike the Government, from *whom payment*  
15 *is sought*. See Fed.R.Civ.P 23(h)(2)(“A class member, or a party from whom payment is  
16 sought may object to the motion [for an attorney fee award.]” The Advisory Committee  
17 specifically notes: “Other parties . . . may not object because they lack sufficient interest  
18 in the amount the Court awards.” Fed.R.Civ.P. 23, Advisory Committee Notes to 2003  
19 Amendments at 152. Thus, the Defendant here, who did not negotiate to pay attorneys’  
20 fees itself when it had the opportunity to do so, cannot now assert a belated interest in  
21 protecting the class.

22 The Ninth Circuit holds the same and explains: “*How the fund is divided*  
23 *between members of the class and class counsel is of no concern whatsoever to the*

1 *defendants who contributed to the fund.” In re Washington Public Power Supply System*  
2 *Securities Litigation*, 19 F.3d 1291, 1301 (9<sup>th</sup> Cir. 1994)(*emphasis added*). It is the  
3 person or entity (including a fiduciary) whose interests are affected that may complain,  
4 not a by-stander. *See Uselton v. Commercial Lovelace Motor Freight, Inc.* 9 F.3d 849,  
5 854 (10<sup>th</sup> Cir. 1993)(holding that it is the class members who have the right to object to  
6 an award of attorney fees.)

7 Further, even if comment by the Defendant were appropriate (and it is not), the  
8 Ninth Circuit has expressly prohibited the type of review the Government proposes here  
9 i.e., mixing the apples of a statutory fee shifting analysis to the oranges of a common  
10 fund fee analysis. *See Stanton v. Boeing*, 327 F.3d 938, 963-972 (9<sup>th</sup> Cir. 2003). In  
11 *Stanton*, the Ninth Circuit held that common fund fees can be requested and awarded in  
12 cases where a fee shifting statute was available. *Id.* at 968. In doing so the Court  
13 discussed the differences between the two fee mechanisms at length. *Id.* The Court  
14 observed that even in the settlement context, a fee shifting approach properly applies  
15 where, as was the case in *Stanton*, the defendant conditioned settlement on its payment of  
16 a negotiated sum certain for counsel’s fees separate and apart from the common fund. *Id.*  
17 at 969. The Court also noted the common fund method should be used where, as in this  
18 case, plaintiffs’ counsel request an award from a common fund established for the benefit  
19 of all Class Members. *Id.* The Court explained that this substantive difference regarding  
20 who is paying the fees is reflected in different standards of judicial review:

21 Fees sought or awarded under a fee-shifting statute require  
22 the application of the standards and procedures crafted for  
23 such statutes, discussed above. Similarly, if the parties  
24 invoke common fund principles, they must follow common  
25 fund procedures and standards, designed to protect class  
members when common fund fees are awarded.

1  
2 *Id.* More specifically, the Court noted, that if fee shifting standards apply, the Court will  
3 evaluate the fee amount through application of the loadstar method. *Id.* at 967. In  
4 common fund cases, however, the court can apply a risk multiplier to the loadstar or use  
5 the percentage of the fund method to evaluate the appropriate fee award. *Id.* The Court  
6 then noted that parties could use one or the other approach but can not mix both.

7           We hold, therefore, that in a class action involving both a  
8           statutory fee-shifting provision and an actual or putative  
9           common fund, the parties may negotiate and settle the  
10          amount of statutory fees along with the merits of the case,  
11          as permitted by *Evans*. In the course of judicial review, the  
12          amount of such attorneys' fees can be approved if they meet  
13          the reasonableness standard when measured against  
14          statutory fee principles. Alternatively, the parties may  
15          negotiate and agree to the value of a common fund (which  
16          will ordinarily include an amount representing an estimated  
17          hypothetical award of statutory fees) and provide that,  
18          subsequently, class counsel will apply to the court for an  
19          award from the fund, using common fund fee principles. In  
20          those circumstances, the agreement as a whole does not  
21          stand or fall on the amount of fees.

22 *Id.* at 972.

23           Here there is no dispute this is a common fund case and plaintiffs' counsel are  
24           entitled to seek fees under the common fund doctrine. Gov's Bf. at 3(acknowledging  
25           Court can award fees from the common fund). All Plaintiffs' counsel of record have  
26           sought fees under the common fund doctrine. Thus, under *Stanton* this Court must apply  
27           common fund standards and procedures to determine if the amounts requested are  
28           appropriate.

29           Defendant's suggestion that the Court could perform a fee shifting analysis in this  
30           context without running afoul of *Stanton* is simply wrong. Further the Government's

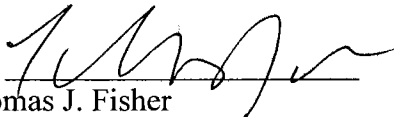
1 brief is misleading in the way it describes what the *Stanton* court found was error. The  
2 Government states the *Stanton* court found error where “a set amount *was assessed*  
3 [passive voice] for attorneys’ fees from the common fund without any consideration of  
4 the availability of recovery under the fee-shifting statute.” Gov’s Bf. at 6 (emphasis  
5 added). That is incorrect. In fact the Ninth Circuit found error only where a set amount  
6 for attorneys fees *was negotiated between counsel and defendant and was to be to be*  
7 *paid by defendant* and the Court then approved the amount using a percentage of the  
8 fund analysis instead of a fee shifting analysis. *See Stanton*, 327 F.3d at 969. In fact the  
9 court below had performed no loadstar analysis at all. *Id.* at 966.

10 The Government’s representation that a fee shifting analysis is appropriate here  
11 because it allegedly has not received a release from a potential statutory claim for  
12 attorney’s fees is specious. The Settlement Agreement expressly releases *all* claims  
13 asserted and unasserted in the EIC litigation (which included claims for fees) and  
14 provides a covenant not to bring any future claims for payment of EIC’s. *See* Agreement  
15 at VII. The Agreement also expressly noted Plaintiffs’ counsel would seek an award of  
16 fees from the Court. *See* Agreement at II.a.v. Where a settlement encompasses a release  
17 of all claims, including potential claims arising from the action, it includes release of  
18 statutory attorneys’ fees and costs. *See e.g. Vaillette v. Fireman’s Fund Ins. Co.*, 18 Cal.  
19 App. 4<sup>th</sup> 680, 686 (1993) (holding Plaintiff barred from seeking statutory attorneys’ fees  
20 by settlement agreement in which he agreed not to execute on “any potential claim”  
21 arising from an event and where the issue of costs and fees was addressed by the  
22 agreement and did not reserve specifically the right to seek statutory fees).

1 It appears the Government is making the remarkable claim that plaintiffs' counsel,  
2 in the context of settlement, would have been free to ask the Court to require Defendant  
3 to pay its fees. *See* Gov's Bf. at 6 (claiming it was plaintiffs' counsels' apparent choice to  
4 not assert a claim for fees under fee shifting statutes). But, it is axiomatic the Court's  
5 power to approve a settlement does not authorize the Court to establish settlement terms  
6 (*i.e.*, payment of fees) to which the parties did not agree. *See also Stanton*, 327 F.3d. at  
7 n.16 *citing Strong .v BellSouth Telecomms.*, 137 F.3d 844. 848 (5<sup>th</sup> Cir 1998)("Any  
8 modification to the agreement, whether by a party or a court would render the Agreement  
9 void.") Thus, the Court cannot modify the settlement by ordering the Government to pay  
10 plaintiffs' counsels' fees, nor can it do so by requiring plaintiffs' counsel to give up its  
11 right to seek fees from the common fund.

12 In short, while the Government did not want to negotiate and pay  
13 attorneys fees separate and apart from the common fund, it wants to have a say in what  
14 the fee award should be. The law does not afford any defendant that amount of influence.  
15 The amount of fee to be awarded from the common fund is between the Court, plaintiffs'  
16 counsel and class members. And it is the Court, not the Government, that will assume  
17 the role of fiduciary to decide the merits of a fee application. *See Stanton*, 327 F.3d. at  
18 970("when awarding attorneys fees from a common fund the district court must assume  
19 the role of fiduciary for the class plaintiffs")(citations omitted). The Government's  
20 request to view detailed billing records should be denied.

1 **WHEREFORE** counsel for Plaintiffs Simpao and Cruz do not oppose a release under a  
2 protective order to other Plaintiffs of their fee application, but assert that review and  
3 comment by Defendant is inappropriate.

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7 By:   
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Attorney for Plaintiffs Simpao and Cruz  
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